

IAH3TODS

Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

16 CR 749 (RA)

5 DONOVAN TODD,

6 Defendant.

7 -----x

8 New York, N.Y.
9 October 17, 2018
3:00 p.m.

10 Before:

11 HON. RONNIE ABRAMS,

12 District Judge

13
14 APPEARANCES

15 GEOFFREY S. BERMAN

United States Attorney for the
Southern District of New York

16 NATHAN M. REHN

17 Assistant United States Attorney

18 COLSON LAW PLLC

Attorneys for Defendant

19 DEBORAH A. COLSON

IAH3TODS

Sentence

1 THE DEPUTY CLERK: United States of America v. Donovan
2 Todd, docket no. 16 CR 749. Counsel, please state your name
3 for the record.

4 MR. REHN: Good afternoon, your Honor. Thane Rehn
5 appearing for the United States.

6 THE COURT: Good afternoon.

7 MS. COLSON: Good afternoon, your Honor. Deborah
8 Colson for Mr. Todd.

9 THE COURT: Good afternoon. Good afternoon to you,
10 Mr. Todd.

11 THE DEFENDANT: Good afternoon.

12 THE COURT: We're here for a sentencing. Mr. Todd
13 pled guilty before Magistrate Judge Aaron on October 16 to
14 conspiring to commit wire fraud in violation of Title 18,
15 United States Code, Section 1349, and that's a plea that I
16 formally accepted by way of order back in September.

17 In connection with today's proceeding, I reviewed the
18 following submissions: The presentence investigation report
19 dated October 10, Mr. Todd's sentencing memorandum dated
20 October 11 with accompanying letters as well as the October 16
21 letter from counsel as well, and the government's sentencing
22 memorandum also dated October 16.

23 Have the parties received each of these submissions
24 and have they been filed on the docket?

25 MR. REHN: Yes, your Honor.

IAH3TODS

Sentence

1 MS. COLSON: Yes, your Honor.

2 THE COURT: So let's begin by discussing the
3 presentence report prepared by the probation department.
4 Ms. Colson, have you reviewed the presentence report and
5 discussed it with your client?

6 MS. COLSON: I have, your Honor.

7 THE COURT: I understand that you object to the
8 portion with respect to how long he's been in custody. Is that
9 right?

10 MS. COLSON: That's right.

11 THE COURT: And the government, you don't contest he's
12 been in custody for approximately seven months, do you?

13 MR. REHN: Your Honor, we had passed along the
14 correspondence we received from the Canadian authorities at the
15 time of his extradition. I saw yesterday with Ms. Colson's
16 letter that they received additional documentation suggesting
17 he had been in custody longer than the documentation we
18 originally received. I don't have any reason to doubt the
19 authenticity of that.

20 THE COURT: So will you just direct me to the
21 particular paragraph that's in the presentence report.

22 MS. COLSON: It is on the first page where it says
23 "release status."

24 THE COURT: What would you propose changing?

25 MS. COLSON: It says that he was in custody from

IAH3TODS

Sentence

1 August 13 until August 30, which is correct. But I would also
2 add that he surrendered himself again and was in custody from
3 March 21 to June 12.

4 THE COURT: That's actually on the next page, although
5 it says July 12. It says, "According to the defendant, he
6 surrendered to authorities in Canada from March 21 and remained
7 until his extradition."

8 MS. COLSON: What the difference is that on the first
9 page, it says, "As per the government and the Ministry of
10 Community Safety and Correction in Toronto, he was in custody
11 from August 13 to August 30 and then, according to the
12 defendant, he returned to custody," but I believe based on the
13 documentation we received the other day, the Ministry of
14 Community Safety and Corrections in Toronto now confirms he
15 returned to custody, and as the government just stated on the
16 record, they don't dispute that.

17 THE COURT: Okay. Do you want to just add in the fact
18 that it is according to the defendant and the Ministry of
19 Community Safety and Corrections?

20 MS. COLSON: Sure.

21 THE COURT: Okay. So we'll just add that in on this
22 page. Do you have any other objections?

23 MS. COLSON: The only other objection is to the date
24 of birth on page two. It says that he was born in 1994, when
25 he was actually born in 1993. And I think that may have been

IAH3TODS

Sentence

1 the source of at least part of the confusion at the Canadian
2 Ministry.

3 THE COURT: I'll change that to 1993 as well. I
4 understand that the name may have been part of the confusion as
5 well.

6 MS. COLSON: That's right.

7 THE COURT: Okay. Mr. Todd, did you have enough time
8 and opportunity to discuss the presentence report with your
9 attorney?

10 THE DEFENDANT: Yes.

11 THE COURT: To review it?

12 THE DEFENDANT: Yeah.

13 THE COURT: Does the government have any objections?

14 MR. REHN: No, your Honor.

15 THE COURT: So the Court adopts the factual findings
16 in the report with the modifications just made. The
17 presentence report will be made a part of the record in this
18 matter and placed under seal. If an appeal is taken, counsel
19 on appeal may have access to the sealed report without further
20 application to the Court.

21 Mr. Todd, when you pled guilty in August, you
22 discussed the federal sentencing guidelines with Magistrate
23 Judge Aaron. As you know, they are a set of rules published by
24 the sentencing commission in order to guide judges when they
25 impose sentence. And although at one time they were mandatory,

IAH3TODS

Sentence

1 meaning judges were required to follow them, judges are no
2 longer bound by the guidelines, but judges must nonetheless
3 consider the guidelines and we must ensure they've been
4 properly calculated.

5 In the plea agreement the parties agree Mr. Todd is
6 facing a guideline range of 27 to 33 months, a range adopted by
7 the PSR. Based on the parties' agreement and my independent
8 evaluation of the guidelines, I accept that guideline
9 calculation. Accordingly, I find Mr. Todd's offense level is
10 18, his criminal history category is I, and his recommended
11 guideline sentence is 27 to 33 months in prison.

12 As I said a moment ago, that range is only advisory.
13 Courts can impose a sentence outside that range based on one of
14 two legal concepts: A departure or a variance. A departure
15 allows for a sentence outside the advisory range based on some
16 provision of the guidelines. In the plea agreement, both
17 parties agreed that no departure from the guidelines range is
18 warranted. Nevertheless, I've considered whether there is an
19 appropriate basis for departure from the advisory range within
20 the guideline system. And while recognizing that I have the
21 authority to depart, I don't find any ground warranting
22 departure under the guidelines.

23 I do, though, have the power to impose a non-guideline
24 sentence which is called a variance pursuant to 18, United
25 States Code, Section 3553(a).

IAH3TODS

Sentence

1 So, with respect to that, I'll just hear from the
2 parties. Does the government wish to be heard?

3 MR. REHN: Unless the Court has questions, I would
4 rest on our submission.

5 THE COURT: You don't dispute he was only involved in
6 this conspiracy -- that his actions only took place on one day?

7 MR. REHN: That's correct, your Honor. We say that in
8 our submission.

9 THE COURT: Got it. Okay. Ms. Colson, would you like
10 to be heard?

11 MS. COLSON: Yes, briefly, your Honor. I would ask
12 that you do vary from the guidelines and sentence Mr. Todd to
13 time served. As we have already stated on the record,
14 including time he spent in custody in Canada, he has now been
15 detained for seven months.

16 Mr. Todd is just 24 years old. He was only 22 when
17 the crime was committed. This is his first offense, and we
18 believe his risk of recidivism is quite low. He's a smart and
19 talented young man. He has a supportive mother and girlfriend
20 back in Canada where he was raised, and he has very solid and
21 feasible plans for his future. And it is clear from his letter
22 that he has learned a valuable lesson during the seven months
23 he has spent incarcerated.

24 Finally, your Honor, while the guidelines do call for
25 27 to 33 months, they are based on a loss calculation that

IAH3TODS

Sentence

1 takes into account the full amount of the loss to Apple during
2 the entire period of the conspiracy. And as your Honor just
3 stated, Mr. Todd himself was only involved for one day, and the
4 loss that he is individually responsible for is significantly
5 lower than the total amount.

6 I would note for the record that your Honor has
7 already sentenced several co-conspirators of Mr. Todd's, and
8 the ones whose conduct most closely mirror his all received
9 sentences of time served.

10 So for those reasons, we would ask your Honor also
11 sentence Mr. Todd to time served.

12 THE COURT: Mr. Todd, is there anything you'd like to
13 say today? I read your letter.

14 THE DEFENDANT: Yeah. I'm truly sorry for my actions.
15 And I understand it was bad decision making, and I'll do
16 everything that I can to make sure it never happens again.
17 That's it.

18 THE COURT: Thank you. Is there any reason why
19 sentence cannot be imposed at this time?

20 MR. REHN: No, your Honor.

21 MS. COLSON: No, your Honor.

22 THE COURT: So I am required to consider the advisory
23 guidelines range of 27 to 33 months as well as various other
24 factors set forth in the prevision of law I mentioned earlier,
25 Section 3553(a) of Title 18. I've done so. Those factors

IAH3TODS

Sentence

1 include, but are not limited to, the nature and circumstances
2 of the offense and the personal history and characteristics of
3 the defendant, because every defendant must be considered
4 individually as a person. Judges are also required to consider
5 the need for the sentence imposed to reflect the seriousness of
6 the offense, promote respect for the law, provide just
7 punishment for the offense, afford adequate deterrence to
8 criminal conduct, protect the public from future crimes of the
9 defendant, and avoid unwarranted sentencing disparities, among
10 other things.

11 As I've noted in other sentencings in this case, the
12 Apple conspiracy involved at least 10 co-conspirators who
13 collectively perpetrated this scheme to defraud Apple dozens of
14 times around the country, causing over \$350,000 in actual
15 losses.

16 As I just noted, Mr. Todd, you were involved in the
17 scheme just for a day, on March 15 of 2016. And as I
18 understand it, participated only in three of the fraudulent
19 purchases totaling over \$18,000 in merchandise from Apple
20 stores.

21 I think it's important to recognize Mr. Todd's limited
22 role in the offense, and that he was not a part of any other
23 schemes, as some of the other co-defendants were. I've also
24 considered the fact that prior to this offense, you have no
25 criminal history, Mr. Todd, or history of violence. You've

IAH3TODS

Sentence

1 pled guilty fairly quickly after you got here, and seemed to be
2 truly remorseful for your limited role in the scheme. So the
3 recidivism in my view seems unlikely.

4 In your letter to the Court, you state that being in
5 jail has not only made you learn your lesson, but has given you
6 a newfound appreciation for freedom. I hope that's true.

7 I've read the letters from your loved ones who
8 describe you as friendly and considerate and respectful and
9 caring and hardworking. I don't have any reason to doubt any
10 of that. And that you are a devoted son and boyfriend.

11 Mr. Todd has been detained for approximately seven
12 months. He'll likely be detained further in ICE custody.
13 Frankly, I think that's more than enough.

14 So I've considered all those factors as well as the
15 other factors set forth in the law, including the need to avoid
16 unwarranted sentencing disparities, and I'm ready to impose
17 sentence.

18 Mr. Todd, can you please stand. It is the judgment of
19 this Court that you be sentenced to a term of time served. I
20 believe this sentence is sufficient, but not greater than
21 necessary, to comply with the purposes of sentencing set forth
22 in the law.

23 Although I do expect you'll be deported, I am
24 nonetheless going to impose a term of one year of supervised
25 release as I did for many of the other co-defendants, to the

IAH3TODS

Sentence

1 extent that he remains here.

2 If you'd like, you could be seated while I describe
3 the conditions of the supervised release as well as other
4 details of your sentence.

5 So all the standard conditions of supervised release
6 shall apply. Ms. Colson, I'm not going to read them all out
7 loud unless you'd like me to. They are on page 21 and 22 of
8 the presentence report.

9 MS. COLSON: That's fine, your Honor.

10 THE COURT: The mandatory conditions shall apply. You
11 shall not commit another federal, state, or local crime. You
12 must not unlawfully possess a controlled substance. You must
13 refrain from any unlawful use of a controlled substance. You
14 must submit to one drug test within 15 days of release from
15 imprisonment and at least two periodic drug tests thereafter as
16 determined by the court. And you must cooperate in the
17 collection of DNA as directed by the probation officer.

18 I'm also going to impose the special conditions of
19 supervised release recommended by probation department. In
20 light of your immigration status, I'm going to order you to
21 obey the immigration laws and comply with the directives of
22 immigration authorities. In light of the nature of the crime,
23 I'm going to order you to provide the probation office with
24 access to requested financial information. And in addition to
25 order you to submit your person, residence, place of business,

IAH3TODS

Sentence

1 vehicle, and any property or electronic devices under your
2 control to a search on the basis that the probation officer has
3 reasonable suspicion to believe that contraband or evidence of
4 a violation of the conditions of your supervised release may be
5 found. The search must be conducted at a reasonable time and
6 in a reasonable manner. Failure to submit to search may be
7 grounds for revocation. And you must inform any other
8 residents that the premises may be subject to search pursuant
9 to this condition. And you will be supervised in the district
10 your residence. Again, to the extent that you remain here.

11 I decline to impose a fine. The probation office has
12 reported you are unable to pay one. I am imposing a mandatory
13 special assessment of \$100 which must be paid immediately.

14 So let's talk about forfeiture and restitution. I
15 don't think I have a forfeiture order here, but I understand
16 there is a consent order. Is that right?

17 MR. REHN: Yes, your Honor. Because the plea was
18 before the magistrate judge, it wasn't entered at the time of
19 the plea. I neglected to bring an order with me to court
20 today. I would propose that the Court enter an oral order of
21 forfeiture, the parties have consented to the amount that's in
22 the PSR, and I'll submit the written order later today.

23 THE COURT: I'm going to order that you are subject to
24 a forfeiture order of \$18,438.61, which is an amount I
25 understand you consented to. And is there a restitution order

IAH3TODS

Sentence

1 in addition or is there one that you intend to submit?

2 MR. REHN: As with the prior defendants in the case,
3 I'll submit a written restitution order within 60 days.

4 THE COURT: Is that on consent as well?

5 MR. REHN: We will confer, but I expect it will be.

6 THE COURT: Okay. All right. Does either counsel
7 know of any legal reason why this sentence cannot be imposed as
8 stated? Ms. Colson?

9 MS. COLSON: No, your Honor. Thank you.

10 MR. REHN: No, your Honor.

11 THE COURT: So that's the sentence of this Court. You
12 have a right to appeal your conviction and sentence, except to
13 whatever extent you may have validly waived that right as part
14 of your plea agreement. If you do choose to appeal, notice of
15 appeal must be filed within 14 days of the judgment of
16 conviction. If you are not able to pay the cost of an appeal,
17 you may apply for leave to appeal in forma pauperis, which just
18 means that court costs such as filing fees will be waived. If
19 you request, the clerk of court will prepare and file a notice
20 of appeal on your behalf.

21 Are there any open counts or underlying indictments
22 that need to be dismissed?

23 MR. REHN: I believe he is named on underlying
24 indictments.

25 THE COURT: That will be dismissed.

IAH3TODS

Sentence

1 So Mr. Todd, I don't think people should be defined by
2 the worst mistake they've ever made. I don't think you should
3 define yourself by this. I think you should take it as a
4 lesson and a situation that you don't want to be in again. You
5 know, in your letter, you wrote that you were a man anxious to
6 get home to his mother, friends, and girlfriend so he can
7 continue to love and care for them. I hope that with their
8 help, that you'll get back on the right track, return to
9 Canada, and lead a law-abiding life going forward. And I wish
10 you luck with that.

11 Are there any other applications at this time?

12 MR. REHN: None from the government.

13 MS. COLSON: No, your Honor. Thank you.

14 THE COURT: Thank you. We are adjourned.

15 THE DEFENDANT: Thank you.

16 (Adjourned)